Supreme Court, U.S.
FILED

991523 MAR 14 2000

OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

U.S. *ex rel.* A-1 AMBULANCE SERVICE, INC.,

Petitioner,

v.

THE COUNTY OF LOS ANGELES, CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EUGENE DONG
Attorney for Petitioner
786 Holly Oak Drive
Palo Alto, CA 94303
(650) 321-4423

157913

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

63pp

QUESTIONS PRESENTED

1. Does the lack of identity of issues litigated in a prior False Claims Action filed by petitioner defeat the application of the doctrine of collateral estoppel?

2. Is possession of information by the United States Government a condition precedent for the application of 31 U.S.C. § 3730(e), the "public disclosure" bar of the Federal False Claims Act?

3. May Defendant(s) raise the public disclosure bar after the Attorney General has investigated the *qui tam* plaintiffs' case, declined to intervene and filed no other motion on behalf of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner and the plaintiff below is U.S. *ex rel.* A-1 Ambulance Service.

The respondents are The County of Los Angeles, California, Schaefer's Ambulance Service, Inc., and American Medical Response, including the former Adams Ambulance Service, Laidlaw Medical Transportation, Inc., Pruner Health Services, Inc., AMR-Wilson Ambulance Service, Inc., Medevac Ambulance Service, Inc. and Goodhew Ambulance Service, Inc.

Defendant State of California named in the caption below was not named in the First Amended Complaint and not served.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, A-1 Ambulance Service, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Reasons for Granting the Writ	10
I. Collateral Estoppel	10
A. The Court Of Appeals' Decision Conflicts With Prior Decisions Of This Court.	10

Contents

		Page
B.	Collateral Estoppel Does Not Apply Because The "Based Upon" Element Was Not Litigated In The San Mateo Action.	11
C.	The Court Had Subject Matter Jurisdiction Because Petitioner Did Not Base Its Action On Respondent's Alleged Disclosures.	12
D.	The District Court Had Subject Matter Jurisdiction And Collateral Estoppel Does Not Apply Because There Were No Allegations Or Transactions To Base Petitioner's Action Upon In The Conference Transcripts.	13
II.	False Claims Act	15
A.	The District Court's Decision Conflicts With A Prior Decision Of This Court.	15
B.	Aside From This Court In *Hughes*, 31 U.S.C. § 3730(e)(4) Has Been Construed Without The Participation Or Guidance Of The United States Leading To Conflicting Conclusions Below.	16

Contents

Page

C. The Government's Position In *Hughes* Mandates Governmental Possession Of Information As A Condition Precedent To The Application Of The Public Disclosure Bar. 16

D. The Government's Position In *Hughes* Mandates Once The Government Declines To Dismiss The Case, Public Disclosure Litigation Is Over. 16

III. The Questions Presented Are Important. ... 16

A. In 1992-1993, There Was A Differential Of $4.7 Million Between Private And County Costs For The Same Level Of Service. 17

B. After The 1994 RFP, There Was A Differential Of $8.6 Million Between Private And County Costs For The Same Level Of Service. 18

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

City of Lomita v. County of Los Angeles, 148 Cal. App. 3d 671 (1983) 2

City of Lomita v. Superior Court, 186 Cal. App. 3d 479 (1986) 2

Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948) 11

Cromwell v. County of Sac, 94 U.S. 351 (1876) 10

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 117 S. Ct. 1871 (1997) 15, 16

Montana v. United States, 440 U.S. 147 (1979) ... 10

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

31 U.S.C. § 3730(b)(2) 6

31 U.S.C. § 3730(e) i

31 U.S.C. § 3730(e)(4) 9, 11, 16

Cited Authorities

	Page
31 U.S.C. § 3730(e)(4)(A)	1
42 U.S.C. § 1320a-7b(b)	7
Calif. Welfare & Inst. Code § 17000	2

TABLE OF APPENDICES

	Page
Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed February 7, 2000	1a
Appendix B — Order And Judgment Of The United States District Court For The Central District Of California Dated And Filed October 6, 1997	3a
Appendix C — Excerpts From County Of Los Angeles 1988 RFP	8a
Appendix D — Excerpts From Transcript Of Provider Conference Dated January 25, 1989	9a
Appendix E — Model Terms From LA County Ambulance Contracts From 1989 RFP's	15a
Appendix F — Model Terms From LA County/ City Ambulance Contracts	17a
Appendix G — Excerpts From Recommendations For Rate Raises In Los Angeles County	18a
Appendix H — Table Of Los Angeles County Ambulance Rates For The Public	22a
Appendix I — Excerpts From County Of Los Angeles 1994 RFP	23a
Appendix J — Excerpt From County Of Los Angeles 1994 Mandatory Bid Conference	25a

Appendices

	Page
Appendix K — Excerpt From Los Angeles County RFP Addendum No. 3 Dated June 10, 1994	29a
Appendix L — Comparison Of Los Angeles County Payments Per Uncollectible, In Mid-1993	31a
Appendix M — LA County Ambulance Contracts Report To Board Of Supervisors	32a
Appendix N — Comparison Of Los Angeles County Payments Per Uncollectible, As Of 1995	33a

Petitioner respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals in *A-1 Ambulance Service, Inc. v. State of California et al.*, Docket No. 97-56685, USDC No. CV-96-01158.

OPINIONS BELOW

This petition presents a Judgment of the Ninth Circuit. The District Court Order Granting Defendants' Motions to Dismiss was filed October 6, 1997 and is included at App. B, p. 3a. The Judgment of the District Court was filed October 6, 1997 and is included at App. B, p. 6a. The unpublished memorandum of the Ninth Circuit Court of Appeals was filed on February 7, 2000 and is included at App. A, p. 1a.

STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. § 1331. The Court of Appeals entered its judgment on February 7, 2000. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 31 U.S.C. § 3730(e)(4)(A):

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the

> action is brought by the Attorney General or the person bringing the action is an original source of the information.

Calif. Welfare & Inst. Code § 17000:

> Every county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

STATEMENT OF THE CASE

Since before 1983, respondent County of Los Angeles ("County") contracted with private ambulance services to provide ambulance services to various Los Angeles County cities which had contracted with the County for it to do so. Respondent County recovered the costs of providing ambulance services to indigent residents from the contracting cities. In *City of Lomita v. County of Los Angeles*, 148 Cal. App. 3d 671 (1983), the state Court of Appeals held that the payment provisions were void for lack of consideration since respondent County have a statutory duty to provide indigents with emergency medical transportation to hospitals. Specifically, "the cost of such services, no matter how or by whom provided, is a charge on the County to be met out of County funds." *Id.*, *Calif. Welfare & Inst. Code* § 17000.

In *City of Lomita v. Superior Court*, 186 Cal. App. 3d 479 (1986), the Court of Appeals issued a mandate requiring respondent County to comply with its opinion.

In 1988, respondent County published a Request for Proposal for Emergency Ambulance Services ("RFP") for various areas in Los Angeles County. Respondent County stated that the objective of the RFP was to enter into contracts in which respondent County was not required to reimburse a contract provider for various enumerated emergency transportation services given to any County responsible indigent patient.

In the RFP, respondent County urged all interested providers to attend a provider's conference so that "questions concerning the written specifications" of the RFP could be answered in the presence of all attendees. In relevant part to this petition, respondent County also stated that written minutes of the conference or a listing of all questions and answers would "not be available for publication" and that all responses and addenda would "be sent only to those firms who have shown an interest in this RFP by attending the contract providers' conference." App. C, p. 8a. Petitioner did not attend the conference.

Shortly thereafter, respondent County entered into a group of contracts for exclusive ambulance services in Los Angeles County with 5 private ambulance services[1], all of whom had been incumbent providers. The maximum public rates would be adjusted according to an inflation adjustment formula. Each contractor agreed not to bill County Responsible indigent patients or their families for emergency medical transportation. County Responsible indigent patients were defined as "General relief or Ability to Pay Recipients". App. E, pp. 15a-16a.

---

1. The contractors will be identified in this petition by their original names for clarity.

Respondent County had divided Los Angeles County into 11 zones. Each contractor was to be paid a certain amount by the County which was less than the maximum subsidy offered for that particular zone or combination of zones. App. E, pp. 15a-16a. Neither the availability nor the amounts of the subsidy had been published in the RFP. Therefore, notwithstanding respondent County's RFP objective not to pay for indigent services, respondent County's payment to the contractors for services to County Responsible patients as defined would appear, without more, to meet County's duty to its indigent residents.

Respondent County also entered into a number of contracts with cities. Excerpts from the model contracts are in App. F, p. 17a.

From 1988 through May 1994, respondent County increased the public's ambulance rates for Advanced Life Support ("ALS") from $252 to $303 and for Basic Life Support ("BLS") from $151 to $182. App. H, p. 22a. Respondent County repeatedly acknowledged that the rate hikes would have "no effect on county costs" App. G, pp. 18a-19a.

Respondent County issued another RFP in March 1994. Respondent County's objective was to enter into contracts in which respondent County may not necessarily need to subsidize a contract provider for emergency ambulance transportation services. Respondent County left out language concerning its indigent patients.

For this round, respondent County made the providers conference mandatory. Respondent County again stated that the purpose of the conference was to "answer all questions

concerning the written specifications of the RFP in the presence of all organizations genuinely interested in proposing for an exclusive operating area(s)." App. I, pp. 23a-24a.

Again as in its previous RFP, respondent County stated that "[w]ritten minutes of the proposers' conference will not be available for publication, . . ." and that the written material resulting from the conference will be mailed to all organizations in attendance "as evidenced by the official sign-in attendance sheet." App. I, pp. 23a-24a. Petitioner did not attend the conference.

On or about April 14, 1994, respondent County's director of health ("Director") reported to respondent's Board of Supervisors, based upon his survey of California's 58 counties, that Los Angeles County's rates were 34% less than the state's average for ALS responses and 38% less for BLS responses. The Director recommended that the board set ambulance reimbursement standards at 85% of the statewide average and apply those rates to the next emergency ambulance transport contract program. The Board adopted the recommendation to begin January 1, 1995. App. G, pp. 19a-20a.

The Director also reported that respondent County's Department of Health Services ("DHS") had requested information from the respondent incumbent ambulance operators about their costs of operation. The Director reported that the operators "have been reluctant to provide specific information", but the respondent operators "indicated" that they have sustained "significant increases in operating expenses" due to state and Federal regulations. The Director also reported that the respondent operators had

also advised DHS that a "high percentage of transports are uncollectible because of the number of medically indigent patients in Los Angeles County." App. G, pp. 20a-21a.

On October 4, 1994, respondent County completed its contracting under the 1994 procurement. There were five primary contractors responsible for emergency ambulance transportation in their zones. The primary contractors sub-contracted with other ambulance services. Under "fiscal impact", the Director reported that "[t]he County's annual cash payment under the new program is $171,780. In-kind County services, including dispatching services, are provided to the contractors in support of the new program." App. M, p. 32a. The distribution of the subsidy is set forth in App. N, p. 33a.

Petitioner filed its complaint on February 16, 1996. Petitioner served the Attorney General with the Complaint and relevant documentary information pursuant to 31 U.S.C. § 3730(b)(2). A year later, the United States declined to intervene. The Government requested that all pleadings be served on it and that only the Complaint, the notice of declining to intervene and the order be unsealed. The Government made no other motion.

On July 8, 1997, petitioner filed its amended complaint naming only the current respondents. Count One against respondents Adams, Crippen, Laidlaw, Pruner, Schaefer, Wilson, Medevac and Goodhew alleged that under color of state law and by agreement with respondent County, the respondent ambulance companies submitted unlawful bills for emergency ambulance services to Medicare beneficiaries which were eventually paid by the United States. Fourteenth Amendment standards of pricing applied because the citizens

were subject to maximum rates for emergency ambulance services by private ambulance corporations enacted by local governments, and because citizens had no choice in the level of services for which they were required to use and pay.

Count Two alleged that under the exclusive franchise agreements, respondent county referred Medicare patients to respondent ambulance companies in exchange for discounted ambulance services on behalf of respondent County in violation of 42 U.S.C. § 1320a-7b(b).

In July 1997, respondent County filed a motion to dismiss, *inter alia*, on public disclosure grounds, submitting approximately 2300 pages of records to the court. In support of its claim that petitioner's action was based on public disclosures, respondent County included the Declaration of Gary T. Izumi who produced "a true and correct copy of the reporter's transcript of the proceedings at the County's January 25, 1989, Provider's Conference, also from the file on this project." Excerpts are appended in App. D. However, respondent County had previously represented to petitioner and the public that written minutes of the 1989 provider conference would not be available. App. C, p. 8a.

Respondent County also submitted in support of its claim the Declaration of Diana K. Shigaki who stated that she had retrieved a true and correct copy of the reporter's transcript of the April 20, 1994, Mandatory Proposer's Conference." Excerpts are appended in App. J. Again however, respondent County had represented to petitioner and the public that written minutes of the 1994 provider conference would not be available. App. I, p. 23a.

Respondent County also submitted in support of its claim a copy of Addendum number 3 to the 1994 RFP. Excerpts are appended in App. K. Again however, respondent County had previously represented to petitioner and the public that all written materials resulting from questions at the 1994 provider's conference would only be transmitted to the attendees of the conference as evidenced by the sign-in sheet. App. I, p. 23a.

Both conference transcripts had the physical appearance of official documents, including a certification in the 1989 transcript that witnesses were sworn in. App. D, p. 14a. The text reveals, however, that when asked from the floor for copies of the transcripts, the County representatives in both instances said that they did not know who instigated the presence of the court reporter, because they were not there on respondent County's behalf. App. D, p. 14a; App. J, p. 28a. In the 1989 conference, the respondent ambulance providers' local trade organization was identified from the floor as the sponsor. App. D, p. 14a. Petitioner has found no evidence indicating how or when respondent County received a copy for its file, but clearly the transcript was under the control of respondent private ambulance providers. The sponsor was not identified in the 1994 conference, and respondent County's representative had to ask for a copy. App. J, p. 28a.[2]

On October 6, 1997, without oral argument, the district court granted defendants' motion to dismiss on grounds of

---

2. Ms. Hastings: We're not doing transcripts or tapes. We are taping, but we had not planned to make the tape available. What will result is additional information. The questions from the session today with the answers will be provided to everybody. You might want to borrow the court reporter from whoever he belongs to. In fact, could we have a copy? He's not ours.

collateral estoppel relying upon the Order Granting Defendants' Motion to Dismiss in *U.S. ex rel. A-1 Ambulance Service, Inc., et al. County of San Mateo, et al.*, C-96-20048 (N.D. Cal. Aug. 6, 1997) ("San Mateo Action"). "The doctrine of collateral estoppel bars relitigation of the issue of subject matter jurisdiction with regards to *qui tam* claims arising out of publicly awarded contracts." The district court did not address whether the individual elements of 31 U.S.C. § 3730(e)(4), (1) based upon the (2) public disclosure of (3) allegations or transactions in a (4) criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, were litigated in the former case. The district court rejected only the argument that collateral estoppel did not apply because there was no final judgment in the prior case. App. B, p. 4a.

The district court also dismissed on the alternative grounds that the "disclosures in this case constitute public disclosures within the meaning of pursuant to 31 U.S.C. § 3730(e)(4)". App. B, p. 4a. The district court rejected petitioner's argument that the allegations and transactions must be in possession of the government prior to relators' filing of the case in order for the public disclosure bar to apply. Again, the district court did not address whether the individual elements of 31 U.S.C. § 3730(e)(4), (1) based upon the (2) public disclosure of (3) allegations or transactions in a (4) criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, were met in the case below.

On February 7, 2000, the Court of Appeals affirmed the district court's dismissal on collateral estoppel grounds based

upon its concurrent judgment in *U.S. ex rel. A-1 Ambulance Service, Inc. v. County of San Mateo et al.*, No. 98-15200. App. A, p. 2a.

REASONS FOR GRANTING THE WRIT

I. COLLATERAL ESTOPPEL

A. The Court Of Appeals' Decision Conflicts With Prior Decisions Of This Court.

Collateral estoppel is intended to preclude parties from contesting matters that they have had a full and fair opportunity to litigate. *Montana v. United States*, 440 U.S. 147, 154 (1979).

> The judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

Collateral estoppel must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the

controlling facts and applicable legal rules remain unchanged. *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 599-600 (1948).

B. Collateral Estoppel Does Not Apply Because The "Based Upon" Element Was Not Litigated In The San Mateo Action.

The decision of the court below conflicts with these decisions of this Court. Under the False Claims Act, a court has jurisdiction if any one of the four elements of 31 U.S.C. § 3730(e)(4)(A) is not present, (1) whether the action was "based upon" (2) a "public disclosure" of (3) "allegations or transactions" in a (4) "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media".[3] Collateral estoppel does not apply conclusively to an issue necessary to support lack of subject matter jurisdiction in this action if it was not litigated in the San Mateo Action.

The court in the San Mateo Action simply did not address the first element, "based upon" the alleged public disclosure. The failure to litigate this issue in the San Mateo Action defeats the applicability of collateral estoppel in this action.

---

3. Assuming, *arguendo*, that respondents may raise the issue at all.

C. The Court Had Subject Matter Jurisdiction Because Petitioner Did Not Base Its Action On Respondent's Alleged Disclosures.

Moreover, there is a material fact difference between the San Mateo Action and this action: The petitioner, having participated in the Monterey procurement, was thereby privy to the alleged publicly disclosed information. However, in this action, petitioner did not even attend the provider conferences for the Los Angeles procurements.

Respondent County's submitted documents show that respondent County itself restricted public and industry access. Respondent County told the public including petitioner in advance of the conferences that the information such as minutes *would not be published* and that the materials generated therein *would be sent only to the participants*. App. C, p. 8a; App. I, pp. 23a-24a. Respondent County could not and did not claim that it sent the documents directly to petitioner for petitioner to use or review. Rather, in the court below, respondent County coupled the presence of the provider conference transcripts in its files with a discussion of the public records statute to apparently suggest that the general public, including petitioner, had potential access to them. However, those transcripts were not respondent County's transcripts. App. D, p. 14a; App. J, p. 27a. They belonged to respondent ambulances' trade organization, at least in the first instance. App. D, p. 14a. So respondent County can not claim to know that they were distributed to any one else. Petitioner received nothing from the respondent ambulance providers before filing this case. Respondent County knew that petitioner's action was not based upon the alleged disclosures because respondent County had control of the mailing and attendance lists.

D. The District Court Had Subject Matter Jurisdiction And Collateral Estoppel Does Not Apply Because There Were No Allegations Or Transactions To Base Petitioner's Action Upon In The Conference Transcripts.

Both the now disclosed 1989 and 1994 transcripts show that there was nothing there to base a complaint on, in other words, no "allegations and transactions". Despite the professed goal of answering potential provider's questions, respondent County did not provide any incriminating materials either because it did not know or did not want to know. Rather, to review respondent County's answers is to demonstrate how the bid was rigged to give an advantage to respondent incumbent ambulance providers.

To bid intelligently on an ambulance contract under the prevailing industry practices, one needs data on (1) the total number of transports, (2) the number of indigent patients and (3) the amount of payment from the county for those indigents. Here are the answers of respondent County to the 1989 providers conference attendees on those subjects:

First, respondent County couldn't provide data on the number of patients actually transported in each zone of the procurement area. App. D, p. 9a. Respondent County published something called "responses" in its RFP. This number is apparently the number of times a county fire truck rolls out in response to a 911 medical call. Only one incumbent ambulance provider got up to report that actual transports were "20 to 35 percent less" than the "responses" which respondent County listed for his zone. App. D, p. 9a. No other incumbent said a word on this subject.

Second, respondent County couldn't produce data on the number of "pays" and "no pays" transported in each zone. App. D, p. 10a. In industry parlance, "no pays" are indigent patients. An incumbent ambulance provider pointed out that the County's announced method of determining those numbers from a survey of the ratio of Medicare and Medicaid patients admitted to the hospital was not reliable, and not fair to "outside providers". App. D, pp. 10a-11a. No other incumbent said a word on this subject.

Third, respondent County acknowledged that it had a maximum of $3,000,000 available which was divided among 11 zones. The $3,000,000 was the amount the incumbent providers were getting. App. D, p. 12a. Inexplicably, respondent County expressly declined to inform the attendees the rationale for the division of the $3,000,000 among the zones. App. D, p. 13a. But respondent County could not provide any data on whether the incumbent providers were profiting or losing on emergency ambulance operations. App. D, pp. 12a-13a. Thus, no one except the incumbents could say whether or not the $3,000,000 was constitutionally sufficient with respect to paying for emergency transportation services to indigent patients.

One incumbent ambulance provider asserted that it could not handle the emergency business without the "backup of our transfer business". To which respondent County replied that is why "exclusivity to critical care transports is in the RFP, to backup the emergency business." App. D, p. 12a. No other incumbent said a word on this subject.

Thus, only respondent incumbent ambulance operators had all the information necessary to know how much indigent-Medicare cost-shifting or constitutionally exorbitant

profiteering from Medicare patients would be available to them in the future bid. They were not saying a thing.

Respondents argued below that because providers asked about the legality of no-subsidy offers under Medicare law in the 1994 procurement, there was a public disclosure. However, the questioners indicated that they would consult their own counsel. Respondent County replied that it would send material to "assist" the provider's counsel. App. J, pp. 26a-27a. In the end, the content of that discussion was irrelevant to the question, did petitioner base its action on that discussion. Even if petitioner were present in the auditorium, it would be absurd to base a False Claims Act case upon someone *questioning* one option of a procurement.

II. FALSE CLAIMS ACT

A. The District Court's Decision Conflicts With A Prior Decision Of This Court.

Review by this Court is warranted because the district court's alternative disposition conflicts with this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871(1997).

The Court is respectfully requested to review the argument stated in *U.S. ex rel. A-1 Ambulance et al v. County of Monterey et al.*, No. 99-1453 at pp. 14-16.

B. Aside From This Court In *Hughes*, 31 U.S.C. § 3730(e)(4) Has Been Construed Without The Participation Or Guidance Of The United States Leading To Conflicting Conclusions Below.

The Court is respectfully requested to review the argument stated in *U.S. ex rel. A-1 Ambulance et al. v. County of Monterey et al.*, No. 99-1453 at pp. 19-20.

C. The Government's Position In *Hughes* Mandates Governmental Possession Of Information As A Condition Precedent To The Application Of The Public Disclosure Bar.

The Court is respectfully requested to review the argument stated in *U.S. ex rel. A-1 Ambulance et al. v. County of Monterey et al.*, No. 99-1453 at pp. 21-22.

D. The Government's Position In *Hughes* Mandates Once The Government Declines To Dismiss The Case, Public Disclosure Litigation Is Over.

The Court is respectfully requested to review the argument stated in *U.S. ex rel. A-1 Ambulance et al. v. County of Monterey et al.*, No. 99-1453 at pp. 22-23.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

The issues in this case are important because by use of the False Claims Act a *qui tam* plaintiff, expert in its commercial field, can show in a court of law the utter disdain respondent County has for the orders of the courts of the state of California and for the financial rights of the elderly Medicare beneficiary to the financial detriment of the United States and its Medicare part B beneficiaries.

Respondent County was twice ordered to pay for ambulance services to its indigent residents. Instead, because the cities of Los Angeles County had sufficient legal savvy to contest the indigent charges, respondent County turned to its incumbent ambulance providers to create a scheme whereby the private provider collects the indigent costs from Medicare and privately insured patients.

As a result of this litigation, petitioner now has the evidence of the magnitude of respondent County's discriminatory pricing. Buried in respondent County's document submission is an item entitled "Addendum no. 3" to the 1994 RFP dated June 10, 1994. The relevant schedule is excerpted in App. K, pp. 29a-30a and lists the number of "General Relief", "Ability to Pay", "Custody Transports" and "Uncollectibles" transports for one year in 1992-1993 in the various zones. The data were provided by the incumbent ambulance contractors.

A. In 1992-1993, There Was A Differential Of $4.7 Million Between Private And County Costs For The Same Level Of Service.

The total number of uncollectible indigents was 27,667. App. K, p. 30a. The County subsidy per year in the 92-93 time period was $2,141,331. App. L, p. 31a. The average County payment in full to the incumbent providers was *$123.98* per indigent. ($2.1 million/27,667). App. L, p. 31a. In mid-1993, the public's minimum bill for an emergency BLS call was $182.25 basic charge plus $67.75 for emergency response which totals *$250*. App. H, p. 22a. Other charges for oxygen and mileage would be tacked on to that.

The minimum revenue from private sources is $6,916,750 for 27,667 patients. App. L, p. 31a. The County's

costs were $2,141,331 total. This is a minimum differential of $4,775,419 between what the County pays and what the public pays for the same service at the lowest service level.

B. After The 1994 RFP, There Was A Differential Of $8.6 Million Between Private And County Costs For The Same Level Of Service.

After the 1994 procurement, the differential is even greater. App. N, p. 33a. In the example, petitioner assumes that the number of indigents remain the same. The total number of uncollectible indigents was 27,667. App. K, p. 30a. The County subsidy per year in the 1995 time period was $171,780. App. N, p. 33a. The average County payment in full to the incumbent providers was *$6.21* per indigent. ($.17 million/27,667). App. N, p. 33a.

In 1995, the public's minimum bill for an emergency BLS call was $248.25 basic charge plus $69.75 for emergency response which totals *$318.00*. App. H, p. 22a. Other charges for oxygen and mileage would be tacked on to that.

The minimum revenue from private sources is $8,798,106 for 27,667 patients. App. L, p. 31a. The County's costs were $171,780 total. This is a minimum differential of $8,626,326 between what the County pays and what the public pays for the same service at the lowest service level.

The seriousness and depth of the problem can be highlighted with just one simple observation. Nobody who received Addendum No. 3 beat petitioner to filing a False Claims Act action. As cited in *U.S. ex rel. A-1 Ambulance et al v. County of Monterey et al.*, No. 99-1453 at p. 11, it is

industry standard to shift the cost of indigent care from the counties to the insured.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE DONG
Attorney for Petitioner
786 Holly Oak Drive
Palo Alto, CA 94303
(650) 321-4423

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 7, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56685

D.C. No. CV-96-01158-GHK

A-1 AMBULANCE SERVICE, INC.,
a corporation, aka Seal 1,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA, a political
subdivision, aka Seal A,

Defendant,

and

COUNTY OF LOS ANGELES, a political subdivision, aka Seal C; ADAMS AMBULANCE SERVICE, a corp., aka Seal D; CRIPPEN AMBULANCE SERVICE, INC., a corp., aka Seal E; LAIDLAW MEDICAL TRANSPORTATION AMBULANCE SERVICE, INC., a corp., aka Seal F; PRUNER HEALTH SERVICES, INC., a corp., aka Seal G; SCHAEFER AMBULANCE SERVICE, INC., a corp., aka Seal H; WILSON AMBULANCE SERVICE, INC., a corp., aka Seal I; MEDEVAC AMBULANCE SERVICE, INC.,

Appendix A

a corp., aka Seal J; GOODHEW AMBULANCE SERVICE, INC., a corp., aka Seal K,

Defendants-Appellees.

MEMORANDUM[1]

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted August 5, 1999
Pasadena, California

Before: KOZINSKI, THOMAS, Circuit Judges, and RAWLINSON[2], District Judge.

We held in the companion case of *United States ex rel. A-1 Ambulance Serv., Inc. v. County of San Mateo*, No. 98-15200, that the district court correctly dismissed A-1's action for lack of jurisdiction under 31 U.S.C. § 3730(e)(4)(A). Therefore, we affirm the district court's order in this case dismissing plaintiff's action against Los Angeles County as precluded by collateral estoppel. *See Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 14 F.3d 848, 850 (9th Cir. 1997).

AFFIRMED

---

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

2. The Honorable Johnnie B. Rawlinson, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED OCTOBER 6, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 96-1158 GHK(AJWx)

The United States of America ex rel. A-1 AMBULANCE SERVICE, INC., a corporation,

Plaintiffs,

vs.

THE COUNTY OF LOS ANGELES, et al.,

Defendants.

ORDER

This matter is before the court on defendants' motions to dismiss plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). We conclude that this matter is appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7.11. After considering the parties' briefs filed in support of and in opposition to the motion, we hereby **GRANT** defendants' motions to dismiss for the following reasons:

Appendix B

(1) The doctrine of collateral estoppel bars relitigation of the issue of subject matter jurisdiction with regards to *qui tam* claims arising out of publicly awarded contracts. *See* Order Granting Defendants' Motion to Dismiss First Amended Complaint, *United States ex rel. A-1 Ambulance Service, Inc., et al. v. County of San Mateo, et al.*, C-96-20048-JW (N.D. Cal. Aug. 6, 1997).[1] Plaintiff challenges application of the collateral estoppel bar on the grounds that the Northern District Order is not final because no judgment has been entered and because it plans to file a motion for reconsideration. We reject this argument. Even though a timely motion to alter or amend a judgment may suspend the finality of the judgment for the purposes of appeal, the finality requirement for collateral estoppel purposes is not coextensive with the issue of appealability. *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) ("To be 'final' for collateral estoppel purposes, a decision need not possess 'finality' in the sense of 28 U.S.C. § 1291."). Furthermore, a pending Rule 59(e) motion does not deprive a judgment of finality for res judicata purposes. *Tripati v. Henman*, 857 F.2d 1366 (9th Cir. 1988). We see no reason why a similar rule should not apply for collateral estoppel purposes.

(2) Even if the issue of subject matter jurisdiction is not barred by collateral estoppel, we conclude that we lack subject matter jurisdiction in this case. The disclosures in

---

1. Although we recognize that there are different counties involved, the legal issue in these two cases is the same. Since plaintiff has not challenged the substantial similarity of the issues in these two cases, it appears to admit that the issues are substantially similar for application of collateral estoppel.

this case constitute public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A). We conclude that section 3730(e)(4)(A) does not require disclosures be limited to federal government sources. Nothing in the statute precludes non-federal public disclosures from qualifying as "public disclosures" sufficient to invoke the jurisdictional bar as long as the information is publicly known. Nor would such a rule unduly restrict *qui tam* actions because the 1986 amendments allow a *qui tam* plaintiff to proceed, even where there has been public disclosure, so long as he or she was the original source of the information. Here, plaintiff has not claimed to be an original source. Although the Third Circuit case of *United States ex rel. Dunleavy v. County of Delaware*, __ F.3d __, 1997 WL 474414 (3rd Cir. Aug. 21, 1997) appears to reach a different result, we respectfully disagree and decline to follow it.

(3) Because we lack subject matter jurisdiction over this action, we do not reach the other issues raised by defendants' motions.

Accordingly, this action is **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated: This 6th day of October, 1997.

s/ George H. King
GEORGE H. KING
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 96-1158 GHK(AJWx)

The United States of America ex rel. A-1 AMBULANCE SERVICE, INC., a corporation,

Plaintiffs,

vs.

THE COUNTY OF LOS ANGELES, a political subdivision, ADAMS AMBULANCE SERVICE, INC. dba AMERICAN MEDICAL RESPONSE, a corporation; CRIPPEN AMBULANCE SERVICE, INC. dba MED-TRANS, a corporation; LAIDLAW MEDICAL TRANSPORTATION AMBULANCE SERVICE, INC., a corporation; PRUNER HEALTH SERVICES, INC., a corporation; SCHAEFER AMBULANCE SERVICE, INC., a corporation; WILSON AMBULANCE SERVICE, INC., dba AMR-WILSON AMBULANCE SERVICE, INC., a corporation; MEDEVAC AMBULANCE SERVICE, INC., a corporation; GOODHEW AMBULANCE SERVICE, INC., a corporation,

Defendants.

JUDGMENT

On October 3, 1997, defendants' motions to dismiss plaintiff's first amended complaint for lack of subject matter jurisdiction pursuant to 12(b)(1) of the Federal Rules of Civil Procedures was granted.

Appendix B

Accordingly, pursuant to said October 6, 1997, order, it is hereby **ADJUDGED, DECREED AND ORDERED** that this action is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated: This 6th day of October, 1997.

s/ George H. King
GEORGE H. KING
United States District Judge

APPENDIX C — EXCERPTS FROM COUNTY OF LOS ANGELES 1988 RFP

Bates 82

All interested providers are strongly urged to attend the providers' conference scheduled for Tuesday, January 1989 at 10:00 a.m.

. . .

Questions concerning the written specifications of this RFP only will be considered in the presence of all attendees.

Written minutes of the conference or a listing of all questions and answers presented at the conference will not be available for publication, . . .

. . .

All written answers to conference questions, future notices, addendums, and other mailings that concern this RFP, and that County representatives may decide to issue after the date of the conference, will be sent only to those firms who have shown an interest in this RFP by attending the contract providers' conference.

APPENDIX D — EXCERPTS FROM TRANSCRIPT OF PROVIDER CONFERENCE DATED JANUARY 25, 1989

Bates 314:11-22

Mr. Cox: Lee Cox, American Medical Transport. In the RFP, the number of responses, have you got the number of people, patients, transported in each zone?

Mr. Dowling: As opposed to responses of dry runs?

Mr. Cox: Yes.

Mr. Dowling: No, I am told.

Mr. Cox: Actual transports.

Mr. Dowling: I understand. And those data are not readily available?

Ms. Bar: Not available.

Bates 314:24-315:7

Mr. Brooks, Professional. I think I can somewhat answer that question.

A certain area north of Glendale that I handle, 99-9/10, exclusively, you have rescue responses in there, and my statistics, and I keep excellent ones, are anywhere from 20 to 35 percent less than that.

I attribute that possibly to the times that the squads go out and we're not called: also to dry runs that are there. But those are not good figures in my district.

Appendix D

Bates 315:18-25

Mr. Otis: Drexel Otis of Stat Ambulance. Could you also include in that data the collectibility figures for the existing providers? It does no good to know that an area is 50 percent poverty and not know what collectibility factor there is.

Ms. Bahr: We are getting some data on that based on hospital experience in those zones, and we will send that out with the addenda when it goes out.

Bates 354:22-355:12

Mr. Decker: Jim Decker, Crippen Ambulance. Audrey, just for clarification, you made a statement that for those providers that are not current providers in Los Angeles County, and the question was brought up about the no-pays or the pays in the particular areas, and you said you were going to check, or you were checking, with the hospitals with regards to that. Is that clear?

I mean, could you explain to me how a hospital is going to tell what an ambulance provider is being paid in a particular area, or franchisee?

Ms. Bahr: What we are going to get is the payor mix from all of the hospitals in each zone, assuming that the patient that arrives at the hospital arrived in one of your ambulances and, therefore, the resources would be the same.

Mr. Decker: That's not true, unfortunately, and that's not fair to the outside providers. That is not true.

Appendix D

Bates 356:6-16

Ms. Bahr: But who the source is going to be — if it's Medi-Cal, it's Medi-Cal for both of them. If it's Medicare, it's Medicare for both of you.

Mr. Decker: Let me just back up a little bit. That's not true. If a Medicare patient is part A/part B, yes, the ambulance provider could possibly get paid for Medicare.

If the Medicare is a part A only, yes, it's going to show on their records that the hospital was paid. The ambulance provider is not going to be paid. There is no part B.

I mean, I am just bringing that up. What we are talking about is, again, payees, as far as going into a hospital doesn't always mean, and a good share of the time does not mean — because when the patient arrives at the hospital and then later is transported to one of the generals, it goes on the medical relief program, or Medi-Cal, and the provider is not privy of that information and consequently is unable to bill Medi-Cal.

Bates 320:21-321:4

Mr. Dowling: We are now going to assign each zone a maximum subsidy. This is the maximum sum that the county will consider paying for the zone in question. If you bid the maximum subsidy permitted, you will receive zero points.

For each 10 percent reduction of the subsidy mentioned, you will earn 4.5 points, for a maximum potential of the

zero bid of 45 points. If the bid goes below zero, i.e. you bid to pay the county for the franchise, there will be a concomitant additional increase.

Bates 321:16-19 Mr. Dowling

And I hope the arithmetic of that is $3 million totally in the aggregate, which is the current subsidy that the county provides for the 15 providers that enjoy current contracts.

Bates 341:22-342:6 Mr. Brooks

. . . Also you do not recognize the fact that we cannot handle emergency services without the back-up of our transfer business. It's impossible. I'll probably lose what few friends I have left: that's a fact. I believe the other operators will corroborate that under any kind of oath you want.

Ms. Hastings: That's exactly why the exclusivity to critical care transports is in the RFP, to backup the emergency business. And it apparently has some lucrative nature to it because people are always fighting to become paramedic providers.

Bates 347:2-348:2 Mr. Dowling

We are not totally ignorant of the economics of the areas that we have under bid, and while we might not always recognize a problem when we see it, if it's bad enough we just might — for all practical purposes, there are 11 zones in this county, now if you want to look at what we currently provide, and while they are all losing money, we are told,

the 3 million, I guess, must help to break them even. And in the aggregate we are offering to get bids high.

. . .

Mr. Pruner.

Mr. Pruner: Don Pruner, Pruner Health Services. Fran, did you say that everybody that handles these zones now are losing money?

Mr. Dowling: I don't know that. I just know that what I have heard is that, in the aggregate, emergency medical transportation, as told to us by the current providers, is a losing proposition.

Mr. Pruner: I just wanted to make sure. I wasn't aware that everybody said they were losing money . . .

Bates 348:3-8

Mr. Pruner: . . . could you tell us what formula you used to come up with the dollars in the specific zones?

Mr. Dowling: We like the formula that we used.

Mr. Pruner: Pardon me?

Mr. Dowling: No, we are not going to discuss how we came up with the formula.

Appendix D

Bates 387:19-388:4

Mr. Paul: Bill Paul from Southland Ambulance. Will the transcript that the court reporter is taking be available?

Mr. Dowling: That is not our transcript. This is to keep an honest transcript. We have a tape recorder that we will replicate for you. That is being provided through the auspices of someone.

Mr. Decker: Los Angeles County Emergency Medical Transportation.

Mr. Dowling: By the 15 current providers of emergency services.

Bates 389:

The undersigned Certified Shorthand Reporter of the State of California does hereby certify:

That prior to being examined, the witness in the foregoing proceedings was duly sworn to testify the truth, the whole truth and nothing but the truth.

. . .

Signed Sheri Clark-Bell

APPENDIX E — MODEL TERMS FROM LA COUNTY AMBULANCE CONTRACTS FROM 1989 RFP'S

September 28 1989
Medevac

Bates 10

Maximum public rates will be the same as the maximum County Code rates as of July 1, 1989. On each July 1 thereafter, the County and the City rates will be adjusted according to the inflation adjustment formula found in the County Code.

Medevac agrees not to bill County Responsible indigents (General Relief or Ability to Pay recipients) or their families for emergency ambulance transportation services.

The County's sole payment obligation to Medevac is a subsidy of $56,225 per month, or $674,695 per year, for the three zones comprising Medevac's exclusive franchise operating agreement. This is $175,558 a year less than the maximum County subsidy allowed for these zones and reduces the County's current $3.0 million annual cost for indigent ambulance services accordingly.

October 26, 1989
Goodhew Ambulance Service, Inc.

Bates 105

Maximum public rates will be the same as the maximum County Code rates as of July 1, 1989. On each July 1 thereafter, the County and the City rates will be adjusted

Appendix E

according to the inflation adjustment formula found in the County Code.

Goodhew agrees not to bill County Responsible indigents (General Relief or Ability to Pay recipients) or their families for emergency ambulance transportation services.

The County's sole payment obligation to Goodhew is a subsidy of $250,413 per year, for the two zones comprising Goodhew's exclusive franchise operating area. This is $287,840 a year less than the maximum County subsidy allowed for these zones and reduces the County's current $3.0 million annual cost for indigent ambulance services accordingly.

APPENDIX F — MODEL TERMS FROM LA COUNTY/ CITY AMBULANCE CONTRACTS

Sept 12, 1991

City of El Segundo
City of San Gabriel

Bates 592

Two City County Agreement

The agreements designate the cities as the exclusive provider of emergency ambulance transportation services within their corporate borders at no cost to the county. Each city retains the exclusive right to establish ambulance service rates and to bill any private party or third party for services provided, but agrees not to bill County-responsible indigent persons.

December 17, 1991

City of Sierra Madre
Rescue-1

Bates 665

City of Sierra Madre Agreement

The agreement designates the City as the exclusive provider of emergency ambulance transportation services within its corporate borders at no cost to the county. The city retains the exclusive right to establish ambulance service rates and to bill any private party or third party for services provided, but agrees not to bill County-responsible indigent persons.

APPENDIX G — EXCERPTS FROM RECOMMENDATIONS FOR RATE RAISES IN LOS ANGELES COUNTY

June 7, 1990

Letter to Board of Supervisors from LA County Director of Health

* * *

The Department of Health Services is recommending that the Board approve a 4.3% rate increase in the maximum ambulance rates chargeable to the public, to be effective July 1, 1990, and to amend the County Code accordingly. This action will have no effect on county costs.

* * *

May 2, 1991

Letter to Board of Supervisors from LA County Director of Health

* * *

The Department of Health Services (DHS) is recommending that the Board approve a 5.3% rate increase in the maximum ambulance rates chargeable to the public, to be effective July 1, 1991, and to amend the County Code accordingly. This action will have no effect on county costs.

* * *

Appendix G

April 14, 1994

Director of Health Report to Board of Supervisors

Proposed Changes in the County Code Relating to Private Ambulance Services

* * *

Issues:

* * *

The Department of Health Services (DHS) has completed an ambulance survey of the 58 counties and is recommending an increase in the base rates for advanced and basic life support response-to-call services equal to 85 percent of the Statewide average.

The new base rates will become effective on January 1, 1995 and will also represent the maximum rates which private operators will be allowed to charge the general public under the County's next Emergency Ambulance Transportation Contract Program.

* * *

Fiscal Impact:

No direct county impact.

* * *

Appendix G

April 14, 1994

Letter Director of Health Services to Board of Supervisors

* * * *

On February 8, 1994, the Board instructed DHS to review base rates prior to releasing the Request for Proposals (RFP) for the County's next Emergency Ambulance Transportation Exclusive Operating Area Program. DHS has surveyed the rates Statewide, and has determined that the average base rates among the 58 counties is $457 for advanced life support response and $292 for basic life support response.

Los Angeles County currently allows $303.25 for advanced life support and $182.25 for basic life support response to call services. In effect, Los Angeles County rates are 34% lower for advanced life support response, and 38% lower for basic life support response than the average for all counties.

* * * *

DHS has also requested information from licensed ambulance operators in Los Angeles County regarding their costs of operation. Although the operators have been reluctant to provide specific information, they have indicated that they have sustained significant increases in operating expenses due to recent Occupational Safety and Health Administration (OSHA) regulations for blood borne pathogens as well as other State and Federal regulations.

Appendix G

Operators have also advised DHS that a high percentage of transports are uncollectible because of the number of medically indigent patients in Los Angeles County.

* * *

Oct. 17, 1996

Letter Health Director to LA County Board of Supervisors

* * *

In approving these actions, the Board is approving the following:

— The addition of four new "special" ambulance services charged the general public for volume ventilator, respiratory therapist, pulse oximeter, and infusion pump, in keeping with new industry standards, medical technology, and the earlier discharge of hospital patients;

Fiscal impact:

There is no cost impact for the County as a result of the Board's approval of these recommendations.

Financing:

The rate increases would be absorbed by the general public.

APPENDIX H — TABLE OF LOS ANGELES COUNTY AMBULANCE RATES FOR THE PUBLIC

Ordinance	Date	ALS	BLS	Code 3	Mi	§ 7.16.280B[1]
88-0170		252.00	151.00	56.00	8.40	Yes
89-0092		260.00	156.00	58.00	8.75	Yes
90-0088		271.00	162.75	60.50	9.00	Yes
91-0071		285.25	171.25	63.75	9.50	Yes
	6/12/92	287.25	172.25	64.75	9.50	Yes
	6/10/93	303.25	182.25	67.75	10.50	Yes
	5/5/94	388.50	248.25	63.75	9.50	Yes
	11/30/94	388.50	248.25	69.75	10.25	Yes
	5/11/95	402.75	257.50	72.25	10.25	Yes
	2/97	462.00	274.75	74.25	11.00	Yes

1. § 7.16.280B states: "This section does not apply to a contract between the ambulance operator and the county where different rates or payment mechanisms are specified."

APPENDIX I — EXCERPTS FROM COUNTY OF LOS ANGELES 1994 RFP

Bates 822

All interested providers must attend the mandatory proposers' conference to participate in this RFP. . . . Because of the potential size of the conference, it would be appreciated if each organization limits itself to no more than three (3) attendees.

Bates 823

All organizations in attendance are to ensure that the official sign-in attendance sheet is completed and signed by one authorized representative of the organization, for two purposes: (1) to serve as evidence that the organization was present at the mandatory conference: and (2) to mail any addenda subsequent to the mandatory conference, if the County determines hat such addenda is required.

The purpose of the mandatory proposers' conference is to answer all questions concerning the written specifications of the RFP in the presence of all organizations genuinely interested in proposing for an exclusive operating area(s).

Bates 824

Written minutes of the proposers' conference will not be available for publication, and County representatives will not hold any private or unilateral consultations before or after the conference that may give a proposer any advantage over another in responding to this RFP.

Appendix I

If valid questions made concerning the written specifications of this RFP are not answered at the time of the conference, . . . then DHS will later mail written answers to these valid questions in the form of an addendum (or addenda, if necessary) to all organizations in attendance at the mandatory proposers' conference as evidenced by the official sign-in attendance sheet.

APPENDIX J — EXCERPT FROM COUNTY OF LOS ANGELES 1994 MANDATORY BID CONFERENCE

Bates 1007:5-16

Mr. Collins: This is a proposers' convention for the request for proposals the county release to the public in March with respect to the Emergency Ambulance Transportation Services Program. This is a mandatory conference. In other words, if you're not here, you won't be expected to propose on this.

And what we're going to ask you is to make certain that you signed in when you came through the doorway with the name and address of your firm, a contact person who we would be getting back to in the event we needed to after this conference, with any further information, addenda to the RFP or anything of that nature.

Bates 1017:8

Ms. Hastings: Good Morning. We'll just go point by point and read each of them, and, as we've requested, if you would hold any of your questions until the end. * * *

Bates 1021:7-9

(Ms. Hastings) Question No. 12, can DHS provide estimate call volumes by census tract and by time of occurrence of calls for exclusive operating areas?

Answer, this *(sic)* data will not be available.

Appendix J

Bates 1033:12-18

Mr. Shrader: Also, within the RFP there's a provision of services at no charge to the County of Los Angeles for county responsible patients. Can the county give us some direction on this? Our concern is that the provision of free services in exchange for the award of a contract may create some legal difficulties related to Medicare regulations.

Bates 1033:19-1034:16

Mr. Mikesell: Funny you brought that up. We have certainly recognized that issue, and toward that end we have contacted our outside counsel and expert in Medicare and Medicade *(sic)* law and particularly on this issue, Mr. Mark Windish, and Mark is providing us with some advice on this area. Certainly we don't want to violate the law, and we don't want our providers to be a party to a violation of the law.

We understand that other counties are doing this, other counties are subject to the same law as of this county, of course, the counties of California. In fact there is at least one county that is receiving reimbursement from the provider agency and substantial reimbursement, I understand. We understand that in that particular case, the OIG inspector general for the HHS has approved that type of arrangement in writing.

What we intend to do, and I'm sorry we don't have it firmed up today for you all here, is to put out a separate memorandum or addendum to all of the proposers that are here today, all the candidates. To describe what we have in

mind, if a proposer wants to submit a no cost or low cost subsidy bid to the county, and we anticipate that — we would hope that we will have that shortly.

Bates 1037:20

Mr. Jones: Thank you. The second question relates back to the services rendered to the county indigent patients and other related populations. My understanding under the law is that it is illegal to make the offer to provide the services for free. We'll have to get our own legal opinion as to how to prepare to make an offer to you without being in violation of the law by making a proposal to you.

We at this point don't have an opinion as to how to do that. So it would appear to us at this point we're in a catch 22.

Mr. Mikesell: Hopefully what we are going to be providing to all of you present today in the next addendum would be of help to your counsel on that issue.

Bates 1047:8-21

Mr. Jones: Don Jones with Medtrans, Laidlaw Medical Transportation. Two Questions. One, will a transcript be of this be able (*sic*) to us?

Ms. Hastings: No.

Mr. Jones: A transcript will not be available.

Ms. Hastings: No, the court reporter is not ours.

Mr. Jones: Then will an audio tape be available?

Ms. Hastings: We're not doing transcripts or tapes. We are taping, but we had not planned to make the tape available. What will result is additional information. The questions from the session today with the answers will be provided to everybody. You might want to borrow the court reporter from whoever he belongs to. In fact, could we have a copy? He's not ours.

APPENDIX K — EXCERPT FROM LOS ANGELES COUNTY RFP ADDENDUM NO. 3 DATED JUNE 10, 1994

General Relief, ATP, Custody, and Uncollectible Transports by Operating Areas

Area	General Relief	Ability to Pay	Custody Transports	Uncollectibles[1]
1	0	0	7	425
2	80	0	0[2]	4691
3	6	0	64	2648
4	3	0	31	3583
5	54	7	103	1056
6	48	40	80	4824
7	3	0	29	2527
8	1	8	16	936
9	26	0	5	1890

(Cont'd)

---

1. The inclusion of "uncollectibles" in this Schedule should not be deemed as indicating that the County is financially responsible for compensating providers for these transports; however, the County wishes to give providers as much information as possible for use in calculating their costs of participating in the Program.

2. Does not track custody cases

Appendix K

(Cont'd)

10A	4	0	137	777
10B	11	1	61	2630
11	18	0	18	1680
Totals[3]	*254*	*56*	*551*	*27667*

The above data was (*sic*) provided by the contractors currently providing services in the exclusive operating areas. No representation is made as to the accuracy of this (*sic*) data or its (*sic*) relevance to the projected call volume, costs, or potential revenues for an ambulance provider under contract to the County.

. . .

Areas 1, 2, 5, 6, 8, 9, and 11 represent data for the period of July 1, 1992 through June 30, 1993. Data for Areas 3, 4, 7, 10A and 10B is for the period of October 1, 1992 through September 30, 1993.

---

3. Provided by Petitioner

APPENDIX L — COMPARISON OF LOS ANGELES COUNTY PAYMENTS PER UNCOLLECTIBLE, IN MID-1993

Area	Subsidy	Provider	"Uncollect-ibles"	BLS+ emergency[1]	ALS+ emergency	Payment per uncollectible
1	301000	Pruner	425			
2,9	250413	Goodhew	6581			
3,4,7	674695	Medevac	8758			
5,6,8, 11	492823	Adams	8496			
10A+ 10B	422400	Wilson	3407			
	$2,141,331		27,667	$250.00[2]	$371.00[3]	$123.98[4]

1. Mileage, oxygen, medications additional
2. Total payment from private source at BLS rates: 27,667 x $250.00 = $6,916,750 plus.
3. Total payment from private source at ALS rates: 27,667 x $371.00 = $10,264,457 plus.
4. Total payment from County of Los Angeles = $2,141,331.

APPENDIX M — LA COUNTY AMBULANCE CONTRACTS REPORT TO BOARD OF SUPERVISORS

December 1, 1994

On October 4, 1994, the Board completed the approval of the five primary contractors for the new Program, and authorized the Director of Health Services to finalize contract negotiations. The current Program expires on December 31, 1994.

Under the agreements, the primary contractors are responsible for 9-1-1 emergency ambulance transportation services at the basic life support (BLS) level in their respective exclusive operating areas.

Fiscal Impact:

The County's annual cash payment under the new program is $171,780. In-kind County services, including dispatching services, are provided to the contractors in support of the new program.

APPENDIX N — COMPARISON OF LOS ANGELES COUNTY PAYMENTS PER UNCOLLECTIBLE, AS OF 1995

Area	Subsidy	Provider	"Uncollect-ibles"[1]	BLS+ emergency[2]	ALS+ emergency	Payment per uncollectible
1	171780	Pruner	425			
2,9	0	Goodhew	6581			
3,4,7	0	Crippen	8758			
5,6,8, 11	0	Adams	8496			
10A+ 10B	0	Wilson	3407			
	$171,780		27,667	$318.00[3]	$458.25[4]	$6.21[5]

1. Using previous figures, since County says that providers saying more indigents than before.
2. Mileage, oxygen, medications additional.
3. Total payment from private source at BLS rates: 27,667 x $318.00 = $8,798,106 plus.
4. Total payment from private source at ALS rates: 27,667 x $458.25 = $12,678,402 plus.
5. Total payment from County of Los Angeles = $171,780.

Supreme Court, U.S.
FILED
APR 14 2000
CLERK

(2)

No. 99-1523

In The

Supreme Court of the United States

U.S. *ex rel.* A-1 AMBULANCE SERVICE, INC.,

Petitioner,

v.

THE COUNTY OF LOS ANGELES, CALIFORNIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:
DE WITT W. CLINTON
County Counsel
DANIEL D. MIKESELL, JR.
Principal Deputy County Counsel
SHARON A. REICHMAN
Deputy County Counsel
County of Los Angeles
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
(213) 974-1825
Counsel for Respondent County of Los Angeles

MICHAEL G. MCCARTY
Counsel of Record
R. MICHAEL SCARANO, JR.
DIANE M. RACICOT
FOLEY & LARDNER
402 West Broadway, 23rd Floor
San Diego, CA 92101
(619) 234-6655
Counsel for Respondents American Medical Response, Inc., Adams Ambulance Service, Laidlaw Medical Transportation, Inc., Pruner Health Services, Inc., AMR-Wilson Ambulance Service, Inc., Goodhew Ambulance Service, Inc. and Medevac Ambulance Service, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29pp

QUESTIONS PRESENTED

1. Does the lack of identity of issues litigated in a prior False Claims Action filed by Petitioner defeat the application of the doctrine of collateral estoppel?

Petitioner did not present this argument in the courts below. The District Court granted summary judgment based on the identical legal issue which had been litigated by Petitioner in the prior action, i.e., whether publication and discussion of the details of disputed county contracts in public proceedings constituted "public disclosure" within the meaning of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

2. Is possession of information by the United States Government a condition precedent for the application of 31 U.S.C. § 3730(e), the "public disclosure" bar of the Federal False Claims Act?

Petitioner argued the second Question Presented in the District Court, but abandoned it in the Ninth Circuit Court of Appeals.

3. May Defendant(s) raise the public disclosure bar after the Attorney General has investigated the qui tam plaintiff's case, declined to intervene and filed no other motion on behalf of the United States?

Petitioner never raised the third Question Presented in the courts below and neither the District Court nor the Ninth Circuit addressed it.

PARTIES TO THE PROCEEDINGS

The parties are as indicated in the Petition.

STATEMENT PURSUANT TO RULE 29.6

In compliance with Supreme Court Rule 29.6, Respondents make the following disclosures.

Respondents Adams Ambulance Service, Inc.; Wilson Ambulance Service, Inc. and Crippen Ambulance Service, Inc. have been merged into Goodhew Ambulance Service, Inc. and the corporate name has been changed to American Medical Response of Southern California, which is a wholly owned subsidiary of American Medical Response, Inc., a Delaware corporation, which is a wholly owned subsidiary of Laidlaw Transit, Inc., a Delaware corporation, which is a wholly owned, indirect subsidiary of Laidlaw Inc., a Canadian corporation, which is publicly traded.

Respondent County of Los Angeles is a political subdivision of the State of California.

TABLE OF CONTENTS

Page

Questions Presented i

Parties To The Proceedings ii

Statement Pursuant To Rule 29.6 ii

Table Of Contents iii

Table Of Authorities v

Introduction 1

Statement Of The Case 2

Reasons Why The Petition Should Be Denied 6

I. The Application Of Collateral Estoppel To Petitioner's Claims Does Not Present Any Significant Issue Warranting Review By This Court .. 6

A. Petitioner Did Not Present This Argument To The Courts Below 6

B. Petitioner's Argument Amounts To A Claim That It Was An "Original Source" In The Northern District Case, A Claim It Never Presented Below 7

C. There Was A Separate And Independent Basis For The District Court's Dismissal... 8

II. The 1986 Amendment To The False Claims Act Does Not Require The Federal Government To Possess Information Concerning A Fraud, But Bars Claims Based On "Public Disclosure" Of The "Allegations Or Transactions" Giving Rise To The Claim 9

TABLE OF CONTENTS – Continued

Page

A. The 1986 Amendment Replaced A Scheme Under Which Government Knowledge Was A Bar To A *Qui Tam* Action 9

B. This Court's Ruling In *Hughes Aircraft* Did Not Hold That The Federal Government Must Possess Information Concerning A Fraud To Trigger The "Public Disclosure" Bar And There Is No Conflict Between *Hughes Aircraft* And The Ninth Circuit Decision In This Case 11

C. No Authority Supports Petitioner's Construction Of The FCA 14

III. Petitioner's Argument On The Third Question Presented Would Deprive *Qui Tam* Defendants Of Any Opportunity To Challenge The Subject Matter Jurisdiction Of The Trial Court 16

A. Petitioner Did Not Present This Argument To The Courts Below 17

B. A-1's Construction Does Not Make Any Sense Given The Statutory Scheme At Issue 17

C. Petitioner's Construction Would Violate Long-Standing Federal Judicial Practice And Would Raise Constitutional Problems For This Provision 19

IV. This Petition Could Be Affected By The Decision In *Vermont Agency Of Natural Resources v. United States Ex Rel. Stevens*, No. 98-1828 20

Conclusion 21

TABLE OF AUTHORITIES

Page

CASES

American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98 (1932) 20

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604 (1991) 19

City of Gainesville v. Brown-Crummer Inv. Co., 277 U.S. 54, 48 S.Ct. 454 (1928) 19

Federal Recovery Services, Inc. v. United States, 72 F.3d 447 (5th Cir. 1995) 15

Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939, 117 S.Ct. 1871 (1997) 9, 11, 12, 13, 14

Mitchell v. Maurer, 293 U.S. 237, 55 S.Ct. 162 (1934) 19

Sisson v. Ruby, 497 U.S. 358, 111 L.Ed.2d 292, 110 S.Ct. 2892 (1990) 6

United States ex rel. A-1 Ambulance Service, Inc. v. County of Monterey, et al., No. 99-1453 .... 1, 2, 8

United States ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810 (9th Cir. 1995) 14

United States ex rel. Doe v. John Doe Corporation, 960 F.2d 318 (2nd Cir. 1992) 14

United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990), cert. denied, 499 U.S. 921, 111 S.Ct. 1312 (1991) 14

United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379 (1943) 10

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (5th Cir. 1994), cert. denied, 513 U.S. 928, 130 L.Ed.2d 278, 115 S.Ct. 316 (1994) 15

United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) 10

United States ex rel. Stinson v. Prudential Insurance, 944 F.2d 1149 (3rd Cir. 1991) 15

United States ex rel. Williams v. NEC Corporation, 931 F.2d 1493 (11th Cir. 1991) 14

United States v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995) 15

Vermont Agency of Natural Resources v. United States ex rel. Stevens, No. 98-1828 20

Yee v. Escondido, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992) 6

STATUTES

31 U.S.C. § 3730(b) 17

31 U.S.C. § 3730(b)(2) 16

31 U.S.C. § 3730(b)(3) 16

31 U.S.C. § 3730(b)(4) 10, 12, 16, 17

31 U.S.C. § 3730(c) 17

31 U.S.C. § 3730(c)(2)(A) 17

31 U.S.C. § 3730(e)(4)(A) ..... *passim*

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

This case is a companion to *United States ex rel. A-1 Ambulance Service, Inc. v. County of Monterey, et al.*, No. 99-1453. The actions were filed separately, in different districts, but the judgment of dismissal in this case was based, in part, upon the order of dismissal entered in the Monterey action. The cases were consolidated for argument in the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit then issued separate opinions, both dated February 7, 2000.

Both of these actions involve the same statutory provision, Section 3730(e)(4)(A) of the False Claims Act, which provides that:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

Petitioner, A-1 Ambulance, has petitioned for Writs of Certiorari in both cases. The second and third Questions Presented in this petition are identical to those raised by Petitioner in No. 99-1453. The Respondents in that action have filed a brief in opposition to the petition and their arguments are repeated here.

The Respondents in this action will also address the first Question Presented, which involves application of the doctrine of collateral estoppel and is unique to this case.

STATEMENT OF THE CASE

Petitioner seeks review of the February 7, 2000 unpublished Memorandum Decision of the Ninth Circuit, affirming an October 6, 1997 Order of the United States District Court for the Central District of California, which dismissed Petitioner's *qui tam* False Claims Act action. The procedural history of this case and the companion case, No. 99-1453, are important to an understanding of the first Question Presented.

Petitioner, A-1 Ambulance, had filed two separate actions, against different California counties and different private ambulance companies, in two different federal districts. The claims in the two actions were identical, however. A-1 asserted in both actions that various contracts which had been awarded by the respective counties to private ambulance companies violated various provisions of the federal Medicare program. A-1's theory of the case, in both actions, was that claims submitted for reimbursement pursuant to those contracts constituted "false claims" within the meaning of the Act.

The defendants in the first action, filed in the Northern District of California, moved to dismiss that action on the grounds that the court lacked subject matter jurisdiction over the claims, pursuant to 31 U.S.C. § 3730(e)(4)(A), asserting that there had been "public

disclosure" of the "allegations or transactions" of the alleged fraudulent scheme because the county contracts at issue had been the subject of public hearings and meetings and the documentation concerning the contracts was a matter of public record.

On August 6, 1997, the Northern District of California dismissed the action, finding that there had been "public disclosure" within the meaning of the Act.[1] That decision was ultimately affirmed by the Ninth Circuit, and is the subject of the Petition for Writ of Certiorari in No. 99-1453.

The second action had been filed in the United States District Court for the Central District of California, against the County of Los Angeles and several private ambulance companies, all of whom had been awarded contracts to provide ambulance service in various parts of the county over an extended period of years. The defendants in the Central District action also moved to dismiss that case on the grounds that the court lacked subject matter jurisdiction, pursuant to 31 U.S.C. § 3730(e)(4)(A), asserting that there had been "public disclosure" of the "allegations or transactions" of the alleged fraudulent scheme because all of the contracts had been granted following numerous public hearings and meetings and the documentation concerning the contracts were a matter of public record.

---

[1] The Northern District also found that A-1 did not claim to be an "original source" of the information and could not be an original source because it lacked "direct and independent information."

In addition to this ground, however, the defendants also raised the argument that A-1 was collaterally estopped from relitigating the legal issues of whether such public meetings, hearings and records constituted "public disclosure" within the meaning of the Act and whether the federal government had to possess knowledge of the alleged fraud. The defendants asserted that A-1 had litigated those exact same issues in the Northern District case and lost. The only defense A-1 raised to this argument was that a formal judgment had not been entered in the Northern District action, merely an order dismissing the case.

On October 6, 1997, the Central District Court dismissed on two, independent grounds. First, it held that A-1 was collaterally estopped from relitigating the legal issue of whether the details of publicly bid county contracts, which were awarded following a series of public meetings and hearings, with the documentation a matter of public record, constituted "public disclosure" of the "allegations or transactions" of alleged fraud pursuant to 31 U.S.C. § 3730(e)(4)(A). (*See* Appendix B to Petition for Writ of Certiorari in this case, p. 4a.) The District Court rejected A-1's argument that a formal judgment of dismissal was required in the Northern District case, finding that the Northern District order was sufficiently "final" for purposes of collateral estoppel. (*Id.*)

In addition, however, the court also held, regardless of any estoppel, that it lacked subject matter jurisdiction over the action because the "allegations or transactions" of the alleged fraud had been publicly disclosed prior to the commencement of the action. The court rejected A-1's

claim that the federal government had to possess knowledge of the alleged fraud or that the "disclosures" had to occur in some federal venue. (*Id.*, pp. 4a-5a.)

Petitioner appealed to the Ninth Circuit. The discussion of collateral estoppel was only two pages of A-1's fifty page opening brief. Once again, the only issue raised in opposition to the claim of collateral estoppel was the argument that a final judgment had never been entered in the Northern District action. (Opening Brief of Plaintiff-Appellant A-1 Ambulance Service, Inc., pp. 49-50.)

On February 7, 2000 the Ninth Circuit issued a detailed opinion in the appeal from the Northern District dismissal, which is now the subject of the Petition in No. 99-1453. In a separate, unpublished Memorandum decision, the Ninth Circuit also affirmed the Central District dismissal on the grounds that A-1 was collaterally estopped by reason of the Northern District dismissal. (*See* Petitioner's Appendix, pp. 1a-2a.)

In its present Petition, A-1 devotes a great deal of discussion to the public bidding process that took place in Los Angeles County during the period these contracts were awarded. It now seeks to contest factual issues, rather than the legal basis for the application of collateral estoppel to its claims. But this Court is not the proper place to contest factual findings, which two lower courts have necessarily found sufficient for application of this doctrine.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE APPLICATION OF COLLATERAL ESTOPPEL TO PETITIONER'S CLAIMS DOES NOT PRESENT ANY SIGNIFICANT ISSUE WARRANTING REVIEW BY THIS COURT

A. Petitioner Did Not Present This Argument To The Courts Below.

In a confusing argument, A-1 contends that the legal issue of whether the claims asserted in the Northern District action were "based upon" the publicly disclosed hearings, meetings and documents at issue in that case is somehow different from the legal issue of whether the claims in the Central District action were "based upon" the publicly disclosed hearings, meetings and documents at issue in the second case.

The only argument A-1 ever presented to either court below in opposition to the claim of collateral estoppel was that a judgment had not been entered in the Northern District action. It never raised any argument that the issues litigated in the Northern District were different than the ones presented in the Central District. As a general rule, this Court does not consider issues unless they have been presented to the lower courts for decision. The failure to raise an issue in the court below, absent extraordinary circumstances, precludes its consideration on appeal. *Sisson v. Ruby*, 497 U.S. 358, 359 fn. 1, 111 L.Ed.2d 292, 297-98 fn. 1, 110 S.Ct. 2892 (1990); *Yee v. Escondido*, 503 U.S. 519, 532-33, 118 L.Ed.2d 153, 168-69, 112 S.Ct. 1522 (1992).

B. Petitioner's Argument Amounts To A Claim That It Was An "Original Source" In The Northern District Case, A Claim It Never Presented Below.

Petitioner's argument is hard to follow, but the argument seems to be that the claims asserted in the Northern District action were not "based upon" the public disclosures surrounding the Monterey County contract because A-1 was an actual bidder for the Monterey County contract, whereas it was not a bidder for any of the Los Angeles county contracts. (*See* Petition for Writ of Certiorari, p. 12.) However, the Northern District Court ruled that Petitioner was not an "original source" of the information at issue and A-1 never claimed to be an "original source" in that action.[2]

Moreover, Petitioner never explains how it came to discover the alleged fraud in the present action if that discovery was not "based upon" the public disclosures made by Los Angeles County. Indeed, the fact that Petitioner did not even take part in the bidding process for any of the Los Angeles contracts proves that its claims are

---

[2] Even if this status as a bidder made any difference, A-1 was not a bidder for the San Mateo County contract at issue in the Northern District action. Thus, A-1's claims against San Mateo County must necessarily have been "based upon" the publicly available documents and proceedings surrounding that contract. A-1's position in the Los Angeles County case was identical to its position with regard to San Mateo County. The legal issue was therefore exactly the same with regard to A-1's claims against San Mateo County in one action and Los Angeles County in the second action.

"based upon" the publicly available documents and proceedings because A-1 had no other way of knowing about these transactions.

C. There Was A Separate And Independent Basis For The District Court's Dismissal.

In dismissing this action, the Central District of California cited two, independent reasons for its decision. It first ruled that collateral estoppel prevented A-1 from relitigating the issue of subject matter jurisdiction based on the "public disclosure" bar of 31 U.S.C. § 3730(e)(4)(A). (*See* Appendix B to Petition for Writ of Certiorari in this case, p. 4a.)

However, it also ruled, without any estoppel, that it lacked jurisdiction because the "allegations or transactions" of the alleged fraud had been "publicly disclosed" during the process for granting the Los Angeles County contracts. (*See* Petitioner's Appendix, pp. 1a-2a.)

The Ninth Circuit chose to affirm on the basis of collateral estoppel, but there was a separate and independent basis for the Central District dismissal. That basis is the subject of the other two Questions Presented by Petitioner, which are identical to the Questions Presented in No. 99-1453.

II. THE 1986 AMENDMENT TO THE FALSE CLAIMS ACT DOES NOT REQUIRE THE FEDERAL GOVERNMENT TO POSSESS INFORMATION CONCERNING A FRAUD, BUT BARS CLAIMS BASED ON "PUBLIC DISCLOSURE" OF THE "ALLEGATIONS OR TRANSACTIONS" GIVING RISE TO THE CLAIM

Petitioner's second argument for considering the Petition for Writ of Certiorari is that the 1986 amendment to the False Claims Act, specifically 31 U.S.C. § 3730(e)(4)(A), requires that the federal government actually possess information about an alleged fraud before the "public disclosure" bar of that section can be triggered.

Petitioner cites to no authority, other than its misreading of this Court's decision in *Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871 (1997), for this proposition. This argument ignores the history of the *qui tam* provisions of the False Claims Act and is directly contrary to the statutory framework adopted in 1986. The Petition should be denied.

A. The 1986 Amendment Replaced A Scheme Under Which Government Knowledge Was A Bar To A *Qui Tam* Action.

The history of the *qui tam* provisions of the False Claims Act has been set forth in numerous Court of Appeals decisions, and was discussed, in part, by this Court in *Hughes*, *see* 520 U.S. at 945-46. The statute has been amended several times in response to judicial interpretation.

In 1943, this Court held, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379 (1943), that the Act as then written did not require a relator to bring any original information to his *qui tam* action, and the relator could rely entirely on allegations and information developed by the government itself.

In response, Congress passed a provision, 31 U.S.C. § 3730(b)(4) (1985 ed.) (repealed), which required a federal district court to "dismiss [a *qui tam*] action . . . based on evidence or information the government had when the action was brought." This provision was eventually construed to require dismissal of an action even where the relator was the one who brought the information to the government, because the government had that information at the time the action was commenced. *See, e.g., United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984).

As a result of the backlash to this construction, Congress undertook a major overhaul of the statute in 1986, adopting an entirely new statutory scheme. One of the new provisions was Section 3730(e)(4)(A). The section provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

No longer was the focus on whether or not the government possessed information concerning the alleged fraud. Rather, the focus was now on whether the "allegations or transactions" of fraud had been the subject of "public disclosure" prior to the commencement of the *qui tam* action. If they had been, the district court would only have subject matter jurisdiction of the action if the relator was "an original source of the information." *See* 31 U.S.C. § 3730(e)(4)(A).

B. This Court's Ruling In *Hughes Aircraft* Did Not Hold That The Federal Government Must Possess Information Concerning A Fraud To Trigger The "Public Disclosure" Bar And There Is No Conflict Between *Hughes Aircraft* And The Ninth Circuit Decision In This Case.

Petitioner bases its entire argument on one paragraph of this Court's opinion in *Hughes Aircraft*, 520 U.S. at 946, 117 S.Ct. at 1876.

One of the undisputed facts in *Hughes Aircraft* was that the federal government was in possession of information concerning the alleged fraud before the action was commenced. Petitioner seems to think that this fact is enough to support its argument in the present case. However, the issue in *Hughes Aircraft* was not whether the government's possession of information was a necessary condition to application of the "public disclosure" provision of the 1986 Amendment to the FCA.

The issue in *Hughes Aircraft* was whether the 1986 amendment could be retroactively applied to allow a *qui tam* action based on alleged wrongs committed before the

amendment took effect. This court noted that, if the old law applied, the undisputed fact that the government already possessed the information would bar the *qui tam* action. On the other hand, if the 1986 law applied, the fact that the government already possessed the information would not bar the relator's *qui tam* action; rather, under the new law, the action would be barred only if (a) the action was based on information that had already been publicly disclosed in an appropriate forum and (b) the relator bringing the action was not an original source for the information. Two paragraphs of this Court's opinion summarize the holding in *Hughes Aircraft,* but Petitioner cites only the second one:

> The allegedly false claims at issue in this case were submitted by Hughes between 1982 and 1984. At that time, the FCA required a district court to "dismiss [a *qui tam*] action . . . based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982 ed.). The Ninth Circuit accepted, and respondent does not dispute, that because "the government was aware of [respondent's] allegations before he filed his suit, the [1982 provision] would bar his claim," were it applicable. 63 F.3d, at 1517.
>
> **Congress amended the FCA in 1986, however, to permit qui tam suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information. See 31 U.S.C. § 3730(e)(4)(A).** Because the 1986 amendment became effective before this suit was commenced, respondent contends that it,

> rather than the 1982 qui tam provision, controls. **We disagree.**
>
> 520 U.S. at 945-46, 117 S.Ct. at 1875-76.

In *Hughes Aircraft*, the fact that the government already possessed the information was an important fact, but it was important not because of any issues under the 1986 law – the law that is still in effect today – but rather, because under the *old* law, it would bar the relator's *qui tam* action. By quoting only the text in bold above, from the second paragraph of the two paragraphs above, Petitioner makes it look as though the government's possession of information is a significant element under the 1986 law, when in fact, it is not. Given the fact that there was no dispute that the government possessed information concerning the fraud before the action was commenced, the second paragraph merely states that this was no longer a disqualifying fact under the 1986 amendment, if it applied.

Further, in *Hughes Aircraft*, the court was not asked to consider a situation in which the government allegedly did not already possess the information about the alleged fraud at the time the action was commenced. Thus, *Hughes Aircraft* cannot be read as making any distinctions under the 1986 law between cases where the government already has the information when the *qui tam* action is first filed and cases where it does not. It stands only for the proposition that, under the old law, government possession of the information bars the *qui tam* suit, whereas under the 1986 law, government possession of the information does not bar the *qui tam* suit.

In fact, the Court had no occasion to construe the new "public disclosure" provision, other than to hold that it removed a defense which had existed under the prior statute, namely, possession of the information by the government prior to suit, 520 U.S. at 948, 117 S.Ct. at 1877. The Court did not hold that government possession of information concerning the fraud was a requirement for the new "public disclosure" bar to apply.

C. No Authority Supports Petitioner's Construction Of The FCA.

Rather than presenting this Court with evidence of a split of authority in the lower courts concerning its position, Petitioner cites to no authority for its argument that the FCA requires the federal government to possess knowledge of the alleged fraud before the "public disclosure" bar applies.

In fact, several courts of appeal have interpreted the 1986 amendment as replacing the focus on federal government knowledge of alleged frauds with the defined public disclosure framework. *United States ex rel. Williams v. NEC Corporation*, 931 F.2d 1493, 1497-98 (11th Cir. 1991); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 813 (9th Cir. 1995); *United States ex rel. Doe v. John Doe Corporation*, 960 F.2d 318, 321-22 (2nd Cir. 1992); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 19 (1st Cir. 1990), *cert. denied*, 499 U.S. 921, 111 S.Ct. 1312 (1991).

Further, several post-1986 cases have interpreted the jurisdictional bar as coming into play when the public

disclosure occurs in the context of **state** court proceedings. In these cases, there was no evidence that the federal government had the information in its possession when the *qui tam* action was filed. *See United States v. Northrop Corp.*, 59 F.3d 953, 967 (9th Cir. 1995) ("By filing his wrongful termination suit in state court, Green 'publicly disclosed' the allegation of fraud . . . "); *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1340-41, 1350-51 (5th Cir. 1994), *cert. denied*, 513 U.S. 928, 130 L.Ed.2d 278, 115 S.Ct. 316 (1994); *United States ex rel. Stinson v. Prudential Insurance*, 944 F.2d 1149, 1147-60 (3rd Cir. 1991).

Finally, public disclosure in "the news media" bars a *qui tam* action under the statute. There is no requirement that the media learn of the fraud from the federal government. This is perhaps the best example that under the 1986 amendment, the focus is on the fact that the "allegations or transactions" giving rise to the claim have already been aired in some "public" forum, rather than on determining exactly when some element of the federal government first learned of them.

This Court should deny the Petition as to the second Question Presented because there is no support for Petitioner's construction of the statute, no conflict in the lower courts concerning Petitioner's construction and because Petitioner has argued, abandoned and then resurrected this argument as it has suited Petitioner's purposes in this protracted litigation.

III. PETITIONER'S ARGUMENT ON THE THIRD QUESTION PRESENTED WOULD DEPRIVE *QUI TAM* DEFENDANTS OF ANY OPPORTUNITY TO CHALLENGE THE SUBJECT MATTER JURISDICTION OF THE TRIAL COURT

A relator commences a *qui tam* action by filing a complaint, under seal, and serving the complaint and "written disclosure of substantially all material evidence and information the person possesses" upon the government, 31 U.S.C. § 3730(b)(2). The government then has at least 60 days to review the case, *in camera*, to decide whether to intervene, *id.*

The government has the option to proceed with the action, assuming primary responsibility for the conduct of the case, or to decline to take control of the action and allow the relator to proceed with the case, Section 3730(b)(4). During this period of time, the defendant has not yet been served with the action and is not served until the trial court orders service to be effectuated, Sections 3730(b)(2) and (b)(3).

The petitioner argues that only the government can raise the "public disclosure" bar provision of the FCA, Section 3730(e)(4)(A) and only during this *in camera* period. In petitioner's phrase "once the government declines to dismiss the case, public disclosure litigation is over." *See* Petition at p. 16, argument heading II.D. There are several problems with this argument.

A. Petitioner Did Not Present This Argument To The Courts Below.

Petitioner did not make this argument in the court's below. As a general rule, this Court does not consider issues unless they have been presented to the lower courts for decision. The failure to raise an issue in the court below, absent extraordinary circumstances, precludes its consideration on appeal. *See* Section I.A *supra*.

B. A-1's Construction Does Not Make Any Sense Given The Statutory Scheme At Issue.

A-1 asserts, in heading II.D (Petition for Writ, p. 16), that "once the government declines to dismiss the case, public disclosure litigation is over." This position does not make any sense in practice, in light of the statutory framework in which the public disclosure bar is found.

Under 31 U.S.C. § 3730(b), a private party (the "relator") may bring a *qui tam* action in the name of the government to seek redress for certain wrongs against the government. The complaint in such an action is initially sealed for a limited period of time, to enable the government to investigate the matter. Under Sections 3730(b)(4) and (c), the government then has the option of taking over the case, intervening in the case, settling the case, dismissing the case, or allowing the private party to proceed with the case without the government's participation.

Under Section 3730(c)(2)(A), the government may dismiss the case for any reason that it deems appropriate.

The government does not need to rely on any jurisdictional bar in order to dismiss the case. Indeed, under Section 3730(e)(4)(A), the public disclosure bar does not apply to actions brought by the Attorney General on behalf of the government. Moreover, the relator who brings the action is not going to assert the public disclosure bar, because that would result in the dismissal of his own action. Thus, the only party to such a *qui tam* action who would conceivably assert the public disclosure bar in order to get the case dismissed is the **defendant**. A-1's position is that the public disclosure bar is no longer available to the defendant, once the government decides not to dismiss the case. This makes no sense whatsoever, since it takes away from the defendant the ability to rely on this defense that has been given to the defendant by statute.

Furthermore, the government can decide to dismiss the case at any time – either early on during the case, or after the case has been pending for several years, or any time in between. Thus, as long as the case is pending, it must be true that the government has declined to dismiss the case. Thus, according to A-1, as long as the case is pending, the defendant cannot raise the public disclosure bar because the government has declined to dismiss the case. Again, A-1's position makes no sense whatsoever.

C. Petitioner's Construction Would Violate Long-Standing Federal Judicial Practice And Would Raise Constitutional Problems For This Provision.

1. A Party Can Always Challenge Subject Matter Jurisdiction

Petitioner fails to consider that the "public disclosure" bar of Section 3730(e)(4)(A) is a jurisdictional requirement for a *qui tam* action. The section begins "No court *shall have jurisdiction* over an action under this section based upon the public disclosure of allegations or transactions . . . " (*Id., emphasis added.*)

The subject matter jurisdiction of a court can always be challenged, at any time, either by the parties or by the court itself and cannot be conferred by consent of the parties, *City of Gainesville v. Brown-Crummer Inv. Co.*, 277 U.S. 54, 59, 48 S.Ct. 454, 456 (1928); *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165 (1934). Petitioner's argument would abrogate this long established federal judicial principle.

2. Petitioner's Argument Would Deprive Defendants of a Defense Without Due Process

This Court attempts to construe statutes to avoid constitutional infirmities, *Cheek v. United States*, 498 U.S. 192, 203, 111 S.Ct. 604, 611 (1991). As described above, nothing in Section 3730(e)(4)(A) or federal case law supports Petitioner's reading of this provision.

However, were Petitioner's construction to be applied, then defendants would never have a chance to argue that the court hearing their case lacked jurisdiction to do so. Under the statutory scheme, the defendant is unaware of the action while it is under seal and is not served with the complaint until the government decides whether to assume control of the case. Under Petitioner's reading of the provision, by the time the defendant is served with the complaint it is already too late to challenge jurisdiction unless the government has already done so.

This would create obvious due process difficulties with the statute. *See, e.g., American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102 (1932). ("Due process requires that there be an opportunity to present every available defense.")

IV. THIS PETITION COULD BE AFFECTED BY THE DECISION IN *VERMONT AGENCY OF NATURAL RESOURCES v. UNITED STATES EX REL. STEVENS*, NO. 98-1828

On November 19, 1999, the Court asked the parties in the *Vermont* case to brief the issue of whether a private person relator has Article III standing to pursue a *qui tam* action, at least where the government declines to take control of the case.

If this Court were to hold in *Vermont* that a private relator lacks Article III standing to pursue a *qui tam* action where the government declines to assume control

of the case, that would be a separate, and independent basis why review in this case would not be necessary.

CONCLUSION

A-1 Ambulance has been challenging the actions of various California counties regarding emergency medical care for many years. This particular challenge has reached all the way to this Court, but there are no significant federal issues presented which would justify review by this court.

Respectfully submitted,

MICHAEL G. MCCARTY
Counsel of Record
R. MICHAEL SCARANO, JR.
DIANE M. RACICOT
FOLEY & LARDNER
402 West Broadway, 23rd Floor
San Diego, CA 92101
(619) 234-6655
Counsel for Respondents American Medical Response, Inc., Adams Ambulance Service, Laidlaw Medical Transportation, Inc., Pruner Health Services, Inc., AMR-Wilson Ambulance Service, Inc., Goodhew Ambulance Service, Inc. and Medevac Ambulance Service, Inc.

Of Counsel:
DE WITT W. CLINTON
County Counsel
DANIEL D. MIKESELL, JR.
Principal Deputy County Counsel
SHARON A. REICHMAN
Deputy County Counsel
County of Los Angeles
648 Kenneth Hahn
Hall of Administration
500 West Temple St.
Los Angeles, CA 90012
(213) 974-1825
Counsel for Respondent
County of Los Angeles

Supreme Court, U.S.
FILED
APR 27 2000
CLERK

No. 99-1523

IN THE

Supreme Court of the United States

U.S. *ex rel.* A-1 AMBULANCE SERVICE, INC.,

Petitioner,

v.

THE COUNTY OF LOS ANGELES, CALIFORNIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

EUGENE DONG
Attorney for Petitioner
786 Holly Oak Drive
Palo Alto, CA 94303
(650) 321-4423

159423

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

Petitioner respectfully submits this Reply to the issues raised by respondents concerning original sources, and identity of issues in the procurements in Los Angeles and San Mateo.

1. Congressional Debate on "Original Source" Confirms the Requirement of Governmental Possession.

Respondents raised the issue of the Northern District court's ruling on "original source" to the detriment of their position. Opp. Brief at p. 7. Senator Grassley explained on the Senate floor that "sources" were persons who provided information *to the Government* or the media[1] *which was subsequently disclosed*:

> In the definition of "original source," the requirement that the individual "voluntarily" informed the Government or news media is meant to preclude the ability of an individual to sue under the qui tam section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations only because the individual was subpoenaed to come forward. However, those persons who have been contacted or questioned by the Government or the news media and cooperated by providing

1. At the time, the relevant section of the proposed bill read "For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government." Cong. Rec. Senate, August 11, 1986 at p. 20531.

> information which later led to a public disclosure would be considered to have "voluntarily" informed the Government or media and therefore considered eligible qui tam relators." Remarks of Sen. Grassley, Cong. Rec. Senate August 11, 1986 at p. 20536.

This explanation makes it clear once again that Congress was only concerned with the public disclosure of Government information, which means that the Government must first possess some information to disclose.[2] While the court held that petitioner was not an original source of information, it did not identify who was. Respondents do not indicate that any of them would have been an appropriate alternate. Respondents continue to argue the rights of a non-existent party or of the attorney general, who has declined to pursue the matter.

2. The Issues Were Not Identical in the Northern District Case.

Respondents' claim that petitioners' issues were "exactly the same" against San Mateo County and in this action against Los Angeles County because A-1 Ambulance Service did not bid in either RFP also redounds to their detriment. Opp. Brief at p. 7, n.2. Respondents state that the "Petitioner never explains how it came to discover the alleged fraud in the present action if that discovery was not 'based upon' the

---

2. The enacted version omitted "media": "(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

public disclosures made by Los Angeles County." Opp. Brief at p. 7. Petitioner is pleased to oblige.

One does not need to be a bidder to obtain relevant data. In the San Mateo Action, petitioners had the data from which they could analyze and determine the number of Medi-Cal and MIA patients on the one hand and the number of Medicare patients on the other which were projected to be transported by respondent Baystar. The analysis provided the projected revenue respondents expected to receive from each class of patients.[3] Petitioner Barrett filed a declaration in the Northern District which stated in relevant part:

> On March 8, 1994, I requested of Ms. Margaret Taylor, Director of Health Services, San Mateo County, copies of the 1990 Baystar Proposal; current ambulance prices and the current ambulance service contract. The Proposal contained cost and revenue projections.

On the other hand, petitioner alleged in this case on "information and belief" that the number of indigent and uncollectibles "may be estimated to be 25% of the transports." First Amended Complaint at paragraph 48. This was made necessary because respondent LA County had informed the public that no transcripts of their provider conferences would be available.

Moreover, as learned subsequently, Los Angeles County had received advice not to request from bidders an estimate of, *inter alia*, their own internal operating costs. "As

3. Neither San Mateo nor Baystar filed the projected profits and cost shifting information in their submissions to the Northern District Court.

discussed immediately below, it is unnecessary and unwise to request from bidders an estimate of their own internal operating costs." Declaration of Gary Izumi, Exhibit A, Addendum 2 to LA County RFP 1988, Bates number 264.

The missing data link concerning the number of indigents carried in LA County was not disclosed to petitioner by respondent Los Angeles County until *after* the filing of this action by the inclusion of Addendum 3 in its Motion to Dismiss as discussed in the Petition, *passim*.

3. Conclusion.

None of the respondents' arguments address how their interpretation of the public disclosure provisions advance the interests of the United States. For the foregoing reasons, and those stated in petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE DONG
Attorney for Petitioner
786 Holly Oak Drive
Palo Alto, CA 94303
(650) 321-4423